No. 76-112

In the Supreme Court of the United States

OCTOBER TERM, 1976

WEYERHAEUSER COMPANY AND CROWN ZELLERBACH CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-10) is not yet reported. The opinion of the district court (Pet. App. A-11 to A-24) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1976. The petition for a writ of certiorari was filed on July 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners were improperly denied compensation for loss of the opportunity to obtain payments from the United States for removal of federal timber resulting from the taking of their portions of a forest access road.

STATUTE INVOLVED

Sections 1 and 2 of the Act of August 28, 1937, 50 Stat. 874, 43 U.S.C. 1181a and 1181b, provide, in pertinent part:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That notwithstanding any provisions in the Acts of June 9, 1916 (39 Stat. 218), and February 26, 1919 (40 Stat. 1179), as amended, such portions of the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may hereafter be classified as timberlands, and power-site lands valuable for timber, shall be managed, except as provided in section 3 hereof, for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal[1] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilties[1]: *Provided,* That nothing herein shall be construed to interfere with the use and development of power sites as may be authorized by law.
>
> The annual productive capacity for such lands shall be determined and declared as promptly as possible after the passage of this Act, but until such determination and declaration are made the average annual cut therefrom shall not exceed one-half billion feet board measure: *Provided,* That timber from said

[1]So in original.

> lands in an amount not less than one-half billion feet board measure, or not less than the annual sustained yield capacity when the same has been determined and declared, shall be sold annually, or so much thereof as can be sold at reasonable prices on a normal market.
>
> If the Secretary of the Interior determines that such action will facilitate sustained-yield management, he may subdivide such revested lands into sustained-yield forest units, the boundary lines of which shall be so established that a forest unit will provide, insofar as practicable, a permanent source of raw materials for the support of dependent communties and local industries of the region; but until such subdivision is made the land shall be treated as a single unit in applying the principle of sustained yield: *Provided,* That before the boundary lines of such forest units are established, the Department, after published notice thereof, shall hold a hearing thereon in the vicinity of such lands open to the attendance of State and local officers, representatives of dependent industries, residents, and other persons interested in the use of such lands. Due consideration shall be given to established lumbering operations in subdividing such lands when necessary to protect the economic stability of dependent communities. Timber sales from a forest unit shall be limited to the productive capacity of such unit and the Secretary is authorized, in his discretion, to reject any bids which may interfere with the sustained-yield management plan of any unit.
>
> SEC. 2. The Secretary of the Interior is authorized, in his discretion, to make cooperative agreements with other Federal or State forest administrative agencies or with private forest owners or operators

for the coordinated administration, with respect to time, rate, method of cutting, and sustained yield, of forest units comprising parts of revested or reconveyed lands, together with lands in private ownership or under the administration of other public agencies, when by such agreements he may be aided in accomplishing the purposes hereinbefore mentioned.

STATEMENT

The United States instituted this condemnation action in the United States District Court for the District of Oregon to acquire a perpetual easement and right-of-way over the portions of a logging road owned by petitioners. The road, portions of which are owned by the United States, provides access to heavily timbered areas of the Molalla watershed; it is the sole means of access to certain government and private lands.

The road was built by petitioner Weyerhaeuser in the 1940's on 20 miles of private land and 8 miles of federal land under a fixed-term permit from the government.. When that permit expired in 1953, the parties executed 20-year road use agreements, under which the government was to pay petitioners road use fees based on the quantity of timber removed over the road (Pet. App. A-3 to A-4). The agreements expressly provided, however, that no interest in the land was thereby created and that the payment of road use fees was not a contribution to the construction costs of the road (*ibid.*). Nineteen months before the expiration of the agreements, the government condemned this perpetual easement. But it permitted petitioners to continue collecting road use fees for the remainder of the term of the agreements and granted them the perpetual right to free use of the road, subject only to payment of proportional maintenance expenses (Pet. App. A-4 to A-5).

The federal timber lands in question are so-called "O & C" lands, title to which the government granted to the Oregon & California Railroad in 1866; in 1916, however, the lands were revested in the United States as unsold land pursuant to the Chamberlain-Ferris Act of June 9, 1916, 39 Stat. 218 (Pet. App. A-2). In 1937, Congress directed that these lands were to be managed as part of a "sustained yield timber program" under which timber is removed at the same rate as it is replaced by new growth, rather than by harvesting all the trees in an area at once. 43 U.S.C. 1181a. Such sustained yield management provides a permanent source of timber supply to stabilize the economic development of local communities and industries, protects existing watersheds, regulates stream flows, and provides recreational facilities.

Regulations promulgated in 1950[2] sought to eliminate monopolization of federal timber sales by providing that when a private party applies for a permit to cross O & C land, 43 C.F.R. 2812.1, the government may require as a condition precedent to the federal permit that the applicant grant it or its licensees reciprocal rights to cross private lands and roads. 43 C.F.R. 2812.3. As the district court noted (Pet. App. A-13 to A-14), when such reciprocal rights are granted, an advance agreement is to establish, among other terms (43 C.F.R. 2812.3-7):

> the consequent proportion of the capital costs of the road system to be borne by such timber of the United States * * * [and] the period of time over, or the rate at which, the United States or its licensees shall be required to amortise such capital cost; * * *

In this case, in 1953 when the prior fixed-term permit expired, petitioners entered into new agreements with the

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[2]15 Fed. Reg. 1971-1977, 43 C.F.R. 115.54 *et seq.* (1950), as amended, 43 C.F.R. 2812.0-3 *et seq.*

government granting them reciprocal, nonexclusive licenses for use of the government portion of the Molalla Road. The agreements, which were for a 20-year term, also required the government to pay road-use fees or tolls based on the amount of federal timber moved over the road (Pet. 7). As both courts below recognized, these agreements were not the type of cost-sharing agreements covered by the 1950 regulations because they expressly provided that no interest in the land was created and that the payment of road-use fees was not a contribution to the construction costs of the road.

In the district court, petitioners contended that, under the existing 20-year agreements and the renewal agreements which inevitably would have been entered into, the United States obligated itself to pay a portion of the capital costs of the Molalla Road, based on its percentage of the timber in the watershed logically tributary to that road. They argued that any prospective private purchaser of their land at the time of taking would have attributed value to the expectancy of receiving continued government road-use payments during the removal of government timber.

The district court, however, found that this alleged element of value had been created solely by the government's logging activity. It held that since the government's need for use of the private portions of this logging road was "special and extraordinary" (Pet. App. A-19), it was not compensable under the principle of *United States* v. *Cors*, 337 U.S. 325, 333, which excludes "enhancement of value resulting from the government's special or extraordinary demand for the property." In finding the government's demand for private logging roads in this area "unique," the trial court noted that the government was "the only participant" in the existing market to purchase use of the Molalla Road. The court further found that Weyerhaeuser and Crown "have never exacted fees for

use of Molalla Road from any party except the government" (Pet. App. A-19 to A-20). Thus, the district court excluded consideration of potential future road-use fees being paid by the government, stating (Pet. App. A-21 to A-22):

> The government's management of the O & C forest lands is in the nature of a project designed to benefit dependent communities. Access to private logging roads is essential to the project's success. Consequently, the government's need for use of the roads is not equivalent to that of a potential private party owning the same lands. The government is serving public interest with which private owners would not be concerned. * * * I consider the ultimate public interest and the forest management problems engendered by it "special and extraordinary" in light of * * * *Cors*.

On interlocutory appeal pursuant to 28 U.S.C. 1292(b), the court of appeals affirmed. Although the government is not bound to use the Molalla Road, the regulations, 43 C.F.R. 2812.0-6(a), establish a preference for use of existing roads with sufficient capacity. Observing that "the government will be obliged, pursuant to the sustained yield program, to harvest federal timber in the region on a continuing basis for some time in the future" (Pet. App. A-5), the court of appeals held that the project requirements for which the easement and right-of-way were being taken "are precisely the future uses of the road for which [petitioners] now seek compensation" (Pet. App. A-9) and that this element of value was not compensable under *Cors*.

ARGUMENT

1. The decision of the court of appeals is correct.[3] Both courts below found that the government's need for the Molalla Road is special and extraordinary in view of its statutory obligations relating to management of O & C timberlands. Weyerhaeuser and Crown contend that there is nothing unique about a federal-private pattern of ownership of lands or about management for sustained timber yield as a basic principle of timberland management (Pet. 9). But 43 U.S.C. 1181a directs that a special sort of localized sustained-yield management, with a minimum annual harvest requirement, shall be practiced in order to sustain the economic well-being of dependent local communities. This unique situation makes the government's need for access over private roads to O & C timber special and extraordinary within the meaning of *United States* v. *Cors*, 337 U.S. 325, 333-334. See also *United States* v. *Whitehurst*, 337 F. 2d 765, 772 (C.A. 4).

Moreover, because the government has created the only market for payment of fees to Weyerhaeuser and Crown for use of their portions of the Molalla Road, as both lower courts concluded (Pet. App. A-8, A-9, A-19 to A-20), this case falls within the long line of this Court's decisions, of which *United States* v. *Fuller*, 409 U.S. 488, 492-494, is the most recent example, holding that just compensation

[3]Petitioners quote from the portion of the district court's opinion indicating concern about the equitable stance of the government. The district court, however, misunderstood the interest taken by the government, as indicated by its statement that the condemnation released the government from its obligation to pay road-use fees for the remaining 19-months of the 20-year agreements (Pet. App. A-23). That is incorrect; the declaration of taking and complaint continued petitioners' right to receive road-use fees for the remainder of the contract period. This fact was recognized by the court of appeals (Pet. App. A-5).

does not include any element of value the government has created by the same undertaking for which the property is taken.[4]

Finally, Weyerhaeuser and Crown mistakenly assert (Pet. 10, 11) that the government's past and future use of the road (absent condemnation) has been and will be on a cost-sharing basis. Certainly as to past activities, the 20-year agreements were not cost-sharing agreements because the government's road-use fees did not qualify as capital cost contributions, as the court of appeals and the district court recognized (Pet. App. A-4, A-15). As to potential future use after the expiration of those agreements (absent condemnation), the lower courts also correctly found (Pet. App. A-4, n. 1) that while there is a regulatory preference for the use of existing adequate access roads, 43 C.F.R. 2812.0-6(a), both the applicable statute, 43 U.S.C. 956, and the regulations, 43 C.F.R. 2812.6-1(a) and 2812.3-1, vest broad discretion in BLM officials to determine whether to issue permits to cross O & C lands and whether to require reciprocal permits for the government and its licensees to cross the applicant's lands and roads. In fact BLM is directed *not* to require a reciprocal right-of-way permit when there is even a reasonable doubt that the private road cannot accommodate the government's needs. 43 C.F.R. 2812.0-6(f). Thus, whether future cost-sharing agreements would be executed under the regulations or some other means of assuring access would be used (such as condemnation) is speculative at best. Such expectations are not compensable interests in eminent domain proceedings. *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 476.

[4]See also *United States* v. *Reynolds*, 397 U.S. 14, 16; *United States* v. *Cors*, *supra*; *United States* v. *Miller*, 317 U.S. 369, 375-379; *Olson* v. *United States*, 292 U.S. 246, 256.

2. Petitioners maintain that the decision here conflicts with the principles of *Almota Farmers Elevator & Warehouse Co.* v. *United States,* 409 U.S. 470;[5] *United States* v. *Fuller,* 409 U.S. 488; *United States* v. *Miller,* 317 U.S. 369; and *Olson* v. *United States,* 292 U.S. 246. But those decisions support the decision below, as we have discussed above. While value enhancement resulting from previous, unrelated government activity can be considered, the only value in petitioners' private road segments arises from the government's use for the same project that necessitated this acquisition. Compensation for that value addition is excluded by every relevant decision of this Court, including those cited by petitioners.[6]

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[5]Petitioners apparently contend that they have a renewal expectancy similar to the one involved in *Almota.* To the contrary, the *Almota* renewal expectancy arose from a lessor-lessee relationship which did not in any way involve the government. The lessee had held the land under successive leases since 1919. *Almota* did not in any way involve compensation for a prospective future lease but rather for the remaining useful life of improvements on the leasehold, in circumstances indicating that lease renewals were virtually certain to permit the improvements to remain in place. *Almota* bears little relation to this case. Here one of the parties to the contractual arrangement is the government and its potential decision to renew a road use agreement is controlled by the regulations discussed above.

[6]Petitioners also assert (Pet. 12):

> However, as to petitioners' privately owned road segments involved here, unlike *Fuller,* the Government could not, under any authority other than eminent domain, destroy the elements of value inherent in their ability to provide economical access to all logically tributary timber.

The government could totally eliminate this element of value simply by ceasing timber harvest of government lands in the Molalla watershed. The only logically tributary timber in the watershed is owned by the government or petitioners. It is because the government, by statute, cannot cease its timber harvesting that the road-use fee element of value must be excluded under *Cors.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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